

# Staff Summary Report

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**Council Meeting Date:** 12/3/04

**Agenda Item Number:** \_\_\_\_\_

**SUBJECT:** Request approval of the Power Pole Relocation Agreement between Union Pacific Railroad Company, Valley Metro Rail and the City of Tempe.

**DOCUMENT NAME:** 20031204casv06 **TRANSPORTATION PLANNING (1101-01)**

**SUPPORTING DOCS:** No.

**COMMENTS:** Request approval by the City of Tempe to approve the Power Pole Relocation Agreement between Union Pacific Railroad, Valley Metro Rail and the City of Tempe for the future relocation of a power pole. The power pole is located at the northeast corner of Farmer Avenue and First Street.

**PREPARED BY:** Larry Schmalz, Senior Planner (Ext. 8924)

**REVIEWED BY:** Mary O'Connor, Deputy Public Works Manager (Ext. 8819)

**LEGAL REVIEW BY:** Marlene A. Pontrelli, City Attorney (Ext. 8120)

**FISCAL NOTE:** The cost for the relocation of the power pole is a regional expense which shall be funded by Valley Metro Rail.

**RECOMMENDATION:** Authorize the Mayor to execute the Power Pole Relocation Agreement between Union Pacific Railroad Company, Valley Metro Rail and the City of Tempe.

**ADDITIONAL INFO:** The City Council previously authorized staff at the December 19, 2002 Council Meeting, Agenda Item #16 to acquire several properties from Union Pacific Railroad. The Power Pole Relocation Agreement is an additional agreement required in order to complete the acquisition of the Union Pacific Railroad properties.

## **POWER POLE RELOCATION AGREEMENT**

### **TEMPE, ARIZONA**

THIS POWER POLE RELOCATION AGREEMENT (the "Agreement") is made effective as of the 4th day of December, 2003, by and among **VALLEY METRO RAIL, INC.**, a nonprofit corporation formed pursuant to A.R.S. § 11-952 ("Valley Metro Rail"), **CITY OF TEMPE**, a municipal corporation created under the provisions of Arizona law ("Tempe"), and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation ("UP").

### **RECITALS**

WHEREAS, pursuant to that certain Purchase and Sale Agreement - Bridge Property," dated of even date herewith (the "Purchase Agreement"), Tempe will purchase certain real property from UP to facilitate Valley Metro Rail's construction and operation of a light rail transit line parallel to UP's existing freight line in Tempe, Arizona; and

WHEREAS, Valley Metro Rail and UP have entered into that certain Construction, Operations and Maintenance Agreement, dated of even date herewith (the "COM Agreement"), which agreement governs the parties' respective rights and obligations with respect to construction activities and rail operations over the area of parallel rail operations; and

WHEREAS, there is an electrical power pole located on the west side of UP's right of way at the First Street crossing (the "Power Pole"), which Power Pole will require relocation in the event UP builds, relocates or extends its siding or a second main track on its right of way in the area of the light rail project; and

WHEREAS, UP has conditioned its execution of the Purchase Agreement and the COM Agreement on receipt of a binding commitment by Valley Metro Rail and Tempe to relocate the Power Pole, subject to the terms and conditions set forth below.

### **AGREEMENT**

1. Except as otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the COM Agreement.

2. Acknowledging that Tempe's acquisition of UP's property under the Purchase Agreement, and Valley Metro Rail's light rail project thereon, has restricted UP's ability to double track on its remaining property, Valley Metro Rail and Tempe jointly and severally agree to relocate, or pay for the relocation of, the Power Pole at their sole cost and expense to a location permitting double tracking of UP's main line across the Salt River, subject to the following conditions:

a. Valley Metro Rail and Tempe shall not be required to relocate the Power Pole unless and until UP commences a project to double track its main line

across the Salt River to accommodate UP's own freight operations. As used herein, (i) the term "commences" means the commencement of actual construction work on a second bridge structure across the Salt River to accommodate a second freight track, and (ii) the term "double track" does not include construction of a sidetrack.

b. Valley Metro Rail and Tempe shall not be required to relocate the Power Pole if:

i. UP's project is funded in whole or in part by contributions from third parties; if the third parties bear some, but less than all, of the costs of improvements and relocations in connection with such project, Valley Metro Rail and Tempe will be responsible for Power Pole relocation costs only in proportion to the percentage of the total project costs that are borne by UP; or

ii. There exists a reasonable engineering solution or alternative to relocating the Power Pole that complies with then-current UP track construction standards (provided that UP will cooperate with reasonable variances thereto), FRA regulations and other applicable state regulations and laws, and the cost of which would be materially less than relocating the Power Pole; then in that event, Valley Metro Rail's and Tempe's sole obligation will be to reimburse UP for the actual cost of such engineering solution, including all costs incurred by UP or its contractors to implement such solution.

3. This Agreement shall expire upon the earlier of (a) the actual relocation of the Power Pole, whether by Valley Metro Rail/Tempe or another person or entity, or (b) reimbursement to UP for the cost of another reasonable engineering solution by Valley Metro Rail or Tempe pursuant to Subsection 2.b.iii hereof.

4. If there is a reasonable relocation site for the Power Pole on property then owned by UP, UP shall permit relocation of the Power Pole to that site, unless the Power Pole would unreasonably interfere with UP's operations in that location.

5. In consideration of Tempe's facilitation of the Project by entering into this Agreement, Valley Metro Rail agrees to indemnify, protect, defend, and hold Tempe harmless, from and against any and all Losses arising out of Tempe's obligations to UP hereunder. As used in this Agreement, the term "Losses" means all losses, damages, claims, demands, costs (including, without limitation, the cost of relocating the Power Pole), liabilities and fees, including, without limitation, reasonable attorneys fees and costs of defense. This section shall survive the expiration of this Agreement.

6. This Agreement is the entire agreement, and supersedes all prior and contemporaneous agreements, representations, and understandings, of the parties concerning relocation of the Power Pole. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all of the parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

7. This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

8. This Agreement shall be construed and interpreted in accordance with the laws of the State of Arizona.

9. This Agreement and each and every provision herein is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against any of the parties hereto.

10. This Agreement is subject to termination pursuant to A.R.S. § 38-511.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement effective as of the date first above written.

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation**

By: \_\_\_\_\_  
Tony K. Love,  
General Manager – Real Estate

**VALLEY METRO RAIL, INC., a nonprofit  
corporation formed pursuant to A.R.S. Section 11-  
952**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO LEGAL FORM

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CITY OF TEMPE, a municipal corporation  
created under the provisions of Arizona law**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

APPROVED AS TO LEGAL FORM

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_